KHOO CHENG HUAT

v.

PUBLIC PROSECUTOR

HIGH COURT MALAYA, PENANG
EDGAR JOSEPH JR J
[CRIMINAL APPEAL NO. 42 (52)-131-85]
21 JULY 1990

CRIMINAL PROCEDURE: *Corruption - Whether Learned President right in convicting the appellant of the charge of accepting having acquitted him of the charge of soliciting - Res-judicata pro-veritate acceptur - Whether conviction of appellant can be quashed where verdict against him is inconsistent with his acquittal on another count - Whether evidence of prosecution witness should be rejected in its entirety - Whether retrial should be ordered - Section 4(a) Prevention of Corruption Act 1961.*

The appellant in this case was jointly charged with his colleague S, and each faced 2 charges in contravention of s. 4(a) of the Prevention of Corruption Act 1961 arising from events which occurred on the same date, at the same time and place.

At the close of the case for the prosecution, a submission of no case to answer was made on behalf of both the appellant and S.

The Learned President was not satisfied as to S's identity and acquitted him of the same, however, she called the appellant to make his defence; the Learned President acquitted the appellant of the charge of soliciting but convicted him of the charge of accepting the gratification of RM100 and proceeded to sentence him to 6 month's imprisonment. The accused appeals against that decision.

The question of critical substance in this case was whether it was safe to allow the conviction of the appellant upon the charge of accepting to stand, having regard to his acquittal on the charge of soliciting.

Held:

[1] Bearing in mind that the alleged act of soliciting and that of accepting were so intermingled as to make it impossible to separate them, plus the fact that they depended for their proof upon the same witness, the testimony of these witnesses should have been rejected in its entirety.

[2] By omitting to reject the testimony of the complainant and his wife in its entirety, the learned President had misdirected herself seriously. On the facts and on this ground alone the conviction cannot stand.

[3] No retrial is to be ordered having regard to the unsatisfactory nature of the prosecution evidence, not to mention the long delay, both before and after conviction. The interests of justice would best be served if no retrial was ordered.

[Appeal allowed; conviction quashed.]

Cases referred to:
Woolmington v. DPP [1935] AC 461
Sambasivam v. PP [1950] MLJ 145
R. v. Hunt 52 CAR 580
R. v. Plummer [1902] 2 KB 339
Goh Ah Yew v. PP [1949] MLJ 150

Legislation referred to:
Prevention of Corruption Act 1961, s. 4(a)

For the appellant - K. Balasundaram; M/s. Balasundaram & Co.
For the public prosecutor - Abu Samah bin Nordin, SFC

JUDGMENT

Edgar Joseph Jr J:

The appellant, an Inspector of Lembaga Padi dan Beras, was jointly prosecuted with his colleague of equal rank named Shariffuddin bin Mohd Shariff, in the Sessions Court, Georgetown.

The trial commenced with each accused facing two charges in contravention of s. 4(a) of the Prevention of Corruption Act 1961, arising from events which occurred on the same date, at the same time and place.

More specifically, the first charge against the appellant was that he did on 14 July 1980 at about 11.50 a.m., at Living Store in Green Lane, Penang, "jointly with one other", corruptly accept, for themselves, a gratification of RM100, from one Ooi Pay Guan (the complainant), as an inducement for forebearing to do an act in relation to his principal's affairs, to wit, to refrain from taking action against the complainant for an offence of keeping four bags of Siamese rice at the said store.

The second charge against the appellant was that on the same occasion, he did jointly with one other, corruptly for themselves, solicit the gratification, referred to in the first charge, from the complainant, for the same purpose.

The two charges against Shariffuddin were in the same terms but, of course, *mutatis mutandis*, as those against the appellant.

According to the evidence led by the prosecution, the appellant accompanied by a male Malay officer of the Lembaga Padi dan Beras, allegedly Shariffuddin, but who for brevity and convenience I shall refer to as 'the other officer', since he was never positively identified by any of the witnesses for the prosecution, visited the complainant's shop on two separate occasions on 14 July 1980.

On the first occasion, they arrived at about 11.15 a.m. but only the complainant's wife (PW4) was in; the complainant being away on business. But, having been told that the complainant would be returning in a few minutes, they waited in the shop, but not idly, for they went to the back portion and there found four bags of Siamese rice. A few minutes later, the complainant did return to the shop. The appellant, the other officer and the complainant went to the rear of the shop. The wife was unable to recall if she followed the party to the rear and admitted that her memory was poor.

But the complainant testified that whilst at the rear of the shop, the appellant and the other officer told him that it was an offence to keep Siamese rice. The appellant added that he had received complaints that the complainant had sold rice above the controlled price. However, the complainant explained in Court that he was not afraid on hearing this because he knew that it was not an offence to sell Siamese rice but did not tell them so because they were from the Lembaga Padi dan Beras and presumably, therefore, were more familiar with the law than he was. He also explained that he had never overstated the selling price of his rice.

After emerging from the shop, either the appellant or the other officer or both of them went to their car, which was parked nearby, and returned to the shop bringing along with them an envelope in which were two forms. At the counter in the shop, they filled in the form and asked the complainant to sign it which he did, affixing at the same time his firm's rubber stamp on it. The two men then left. However, both forms were never recovered in the course of investigations and so were never produced in the Court below.

Some of the events thus far narrated had been observed by one Mohamad bin Long (PW3) a family friend and customer of the complainant who was at the counter of the shop and waiting for his cheque to be exchanged by the complainant for cash. Apart from hearing the words "Siamese rice" and "investigate" he could not understand what the conversation was about since it was in Hokkien. He could not however see or hear what transpired when the party, which included the complainant's wife, moved to the rear of the shop. But, like the complainant and his wife, PW3 had testified that it was this appellant who did most of the talking.

Then, the forms having been signed by the complainant, the appellant and the other officer left the shop followed shortly thereafter by PW3.

However, some ten to fifteen minutes later, the appellant and the other officer returned to the shop, the appellant bringing along with him a camera to photograph the four bags of Siamese rice but, by then, the complainant had removed them.

It was at this juncture that the events, as deposed to by the complainant and his wife, which implicated the appellant and the other officer with the offences charged, occurred.

At first, at the back of the shop, the appellant told the complainant that he wished to seize the entire stock of rice then he said he wished to seize half of it. Both the complainant and his wife begged for mercy. The complainant was then required to go to the front of the shop which he did. At this point, it was alleged that the appellant demanded payment of RM200. Then followed some bargaining, the complainant replying that the four bags of Siamese rice were not worth RM200 and were for his own consumption. It was further alleged that the appellant referred him to the other officer who then wrote the figures RM400 and RM150 on a page in the complainant's bill book and explained that if the complainant were prosecuted in Court he would be fined RM400, whereas, if he paid RM150 to them the matter would be settled.

At this time, according to the complainant, he told his wife to go upstairs and get the money, which she did bringing along with her RM100 which the complainant took and handed to the other officer. Both men then left the shop.

At about 4.15 p.m. the same day, the complainant lodged a report with the Anti Corruption Agency. In the upshot, the appellant and Shariffuddin were arrested but only on 24 December 1982 and prosecuted upon the charged aforesaid, they being first charged in Court on 24 January 1983.

At the close of the case for the prosecution, a submission of no case to answer was made on behalf of both the appellant and Shariffuddin.

The Learned President upheld the submission made on behalf of Counsel for Shariffuddin in respect of both the charges because she was not satisfied as to his identify and acquitted him of the same. However, she over-ruled the submission of no case made on behalf of the appellant as regards both the charges of soliciting and accepting.

When called upon for his defence, the appellant testified that he went to the complainant's shop accompanied by the other officer who he identified as Shariffuddin. At that time, the complainant was not in but his wife was. So, the appellant said that he asked her for the licence and the stock book, P2. He then made a physical check of the rice stock in the middle portion of the shop, the result of which was that the physical stock corresponded with that recorded in the stock book. The appellant added that he also checked the price tags on the sacks of rice and found all was in order. The appellant said that Shariffuddin then signed the stock book and they both then left the shop.

But, on arrival at Perak Road, the appellant said that he realised that he had left his diary in the shop, so he went back to fetch it. Upon returning to the shop, he found both the complainant and his wife in the shop. When he was introduced to the complainant by the wife, he and Shariffuddin said "hello" and left after he had recovered his diary from the counter. The appellant denied that he had found Siamese rice on the premises or that either he or Shariffuddin had demanded money. He also denied that Shariffuddin had accepted RM100 from the complainant. He maintained that while in the shop he spoke only in English.

Shariffuddin was called as a witness on behalf of the appellant but he was obviously a witness with a purpose of his own to serve and added little to the defence case. He recalled accompanying the appellant on 14 July 1980 to inspect rice licences. He recalled visiting a shop but could not remember its name. He could not remember if it was the complainant's shop which he visited.

In the event, the learned President acquitted the appellant of the charge of soliciting as it "had not been proved beyond reasonable doubt" but convicted him of the charge of accepting the gratification of RM100 and proceeded to sentence him to six months' imprisonment. This was on 4 November 1985.

The learned President recognised that there were differences as between the complainant's report (Ex. P5) and his testimony in Court; the most important of which being that in his report he alleged that it was the other officer who had demanded the sum of RM200, whereas, in Court he had testified that it was the appellant who had made that demand. The complainant's explanation for this was that when making his report he said it was the other officer who made the demand in order to simplify matters. In my opinion, it was an explanation which was quite unacceptable since the alleged episode during the second visit to the complainant's shop was simple and straightforward requiring no simplification.

Be that as it may, although the learned President did not expressly say that she rejected that explanation, the cogent fact remained that she did acquit the appellant of the charge of soliciting the sum of RM100 upon the ground that it had not been proved. Upon the facts, that acquittal could only have been possible, had the learned President rejected the testimony of the complainant and his wife regarding the alleged soliciting of the RM100 by the appellant.

It is true that although there are a number of criticisms which may be levelled against the defence of the appellant, the fundamental point remained that the case for the prosecution had to stand or fall according to its own strength or weakness since the legal burden of proof as regards the alleged acts of soliciting and acceptance of the gratification by the appellant, lay upon the prosecution throughout the trial. (See *Woolmington v. DPP* [1935] AC 462, 461, 482 HL).

The question therefore of critical substance was whether, having regard to the particular circumstances of this case, the learned President was right in convicting the appellant of the charge of accepting having acquitted him of the charge of soliciting the very sum he had allegedly accepted - an acquittal against which the prosecution had not appealed and the correctness of which they were bound to accept. The *maxim "res judicata pro veritate acceptur"* is no less applicable to criminal than no civil cases. (See *Sambasivam v. PP* [1950] MLJ 145.

It is trite law that an appellant may have his conviction quashed on the ground that the verdict against him was inconsistent with his acquittal on another count, if it can be demonstrated that the inconsistency is such that it would not be safe to allow the verdict to stand. (See *R. v. Hunt* 52 CAR 580 per Lord Parker CJ).

So, the question arises, is it safe to allow the conviction of the appellant upon the charge of accepting to stand having regard to his acquittal on the charge of soliciting?

Now, as regards the charge of soliciting, of which the appellant was acquitted, he was entitled to be taken as an innocent man. As was well put by Bruce J in *R. v. Plummer* [1902] 2 KB 339, 349 "I think it is a very dangerous principle to adopt to regard a verdict of acquittal as not fully establishing the innocence of the person to whom it relates."

It was therefore most material for the learned President to have recognised - but clearly she did not - that the appellant having been acquitted on the charge of soliciting, he was entitled to be taken as innocent on that charge. The learned President should then have gone on to warn herself - but clearly again she did not - that as no reliance could be placed on those parts of the evidence of the complainant and his wife which related to the charge of soliciting, of which he had to be taken as an innocent person, she had to consider to what extent she could rely upon those parts of the evidence of these witnesses in so far as it related to the charge of accepting.

It seems to me that it was imperative for the learned President to have adopted this approach when evaluating the evidence both for the prosecution and the defence and that had she done so, I cannot confidently say, that she would, inevitably, have convicted the appellant on the charge of accepting, having regard to the particular circumstances of this case.

Now, what were those circumstances? One begins with the charges against the appellant; these alleged that the soliciting of the RM100 and the acceptance of the same occurred on the same date, at the same time and place. The testimony of the complainant and his wife was to the like effect. In other words, the effect of their evidence was that had there been no soliciting by the appellant there would have been no payment to him. So, the core of the transaction was the alleged act of soliciting by the appellant. But, at the close of the case for the defence the learned President had acquitted the appellant of the charge of soliciting which could only mean that she found the testimony of the complainant and his wife that it was the appellant who solicited the gratification unacceptable.

In such a situation, bearing in mind that the alleged act of soliciting and that of accepting were so intermingled as to make it impossible to separate them, and they depended for their proof upon the same witnesses, that testimony should in all fairness, have been rejected in its entirety. As Spencer-Wilkinson J said when speaking for our then Court of Appeal, in *Goh Ah Yew v. PP* [1949] MLJ 150, "A witness cannot be regarded as a split personality who is regarded as worthy of credit at one moment and untrustworthy at another."

In omitting therefore, to direct herself as aforesaid, and in consequence, in omitting to reject the testimony of the complainant and his wife in its entirety, the learned President had misdirected herself seriously, on the facts, and on this ground alone the conviction cannot stand.

I have given consideration to the question whether a retrial should be ordered, but having regard to the unsatisfactory nature of the prosecution evidence not to mention the long delay both before and after conviction, the interests of justice would best be served, if no retrial were ordered.

The result therefore is that the appeal is allowed, the conviction is quashed, the sentence set aside and the appellant acquitted and discharged. The public prosecutor's appeal against sentence is, in consequence, dismissed.

Also found at [1990] 2 CLJ 790